SUPREME COURT, U. S.
JUL 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, ...

No. 73-2038

CHURCHILL AREA SCHOOL DISTRICT and TURTLE CREEK AREA SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRENCE KNIGHT, PAMELA KNIGHT, DARRYL KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated; and COMMONWEALTH OF PENNSYLVANIA; EDWARD HALLENBERG, as President of the Allegheny County Board of School Directors and as President of the Allegheny Intermediate Unit Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the Pennsylvania State Board of Education; and the PENNSYLVANIA STATE BOARD OF EDUCATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Churchill Area School District and Turtle Creek Area School District, Allegheny County, Pennsylvania (Churchill and Turtle Creek Schools), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in these proceedings on April 18, 1974.

Opinions and Orders Below

The judgment of the United States Court of Appeals for the Third Circuit is not as yet reported and is found in the appendix pps. 1-6. This judgment was issued by a three-judge panel, and a petition for rehearing before a court *en banc* was refused June 4, 1974, as shown in appendix p. 7.

The judgment of the Court of Appeals reviewed the orders of the District Court of May 15, 1973, found in appendix pps. 8-49; of June 13, 1973 found in appendix p. 48; of June 13, 1973, found in appendix p. 49; of October 11, 1973, found in appendix pps. 53-55; and of November 6, 1973, found in appendix pps. 89-91.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 18, 1974. This petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Where a dual school system never existed, does the formation of a large school district from three smaller school districts constitute an unconstitutional act by state authorities and give jurisdiction to the District Court where the small districts whose boundaries were conterminous with their municipal boundaries had minority race (defacto) concentrations of 71%, 52%, and 28% so as to form a school district containing 43% minority race just because other alternatives were available which would have lessened this ratio?

2. Is a school district whose interest may be affected by the action of a Federal District Court in remedying another unconstitutionally formed school district an indispensable party to the litigation so that the District Court has to dismiss the action for lack of jurisdiction if such a district is not made a party?

3. Can a Circuit Court of Appeals refuse to examine the sufficiency of the District Court's jurisdiction when reviewing a refusal of the Lower Court to grant a petition to interplead because such a request is made by the interpleaders who are not parties to the action?

4. Is a school district, not made a party to an action and whose creation is not questioned as to the constitutionality of its formation, subject to being dismembered and/or otherwise involved so as to remedy an unconstitutionally-formed school district under the equitable powers of the Federal District Court?

5. Is a school district, not a party to the litigation but whose boundaries and whose very existence may be affected by the remedy fashioned by the District Court and who presents a petition to interplead as a party-in-interest after an *ex parte* hearing on the merits of the case involving alleged unconstitutional actions of state officials in the formation of an adjacent or near-by school district (no claim or finding being made as to the petitioning districts' formation) and after the order is filed on the matter by the Court but before thirty (30) days has elapsed after the order and before any hearing is held on the remedy phase of the litigation, timely under Rule 24 of the Federal Rules of Civil Procedure and does a refusal of such a petition constitute a denial of due process to the district guaranteed under the Constitution of the United States?

6. Is a school district, not a party to the litigation, who is described by name for the first time as a district whose boundaries and whose existence *is* to be affected in a motion made by the State Board of Education pursuant to the order of court to prepare a plan of desegregation and not described as merely an adjacent and/or near-by district whose boundaries *may* be affected, timely in its application to interplead as a party-in-interest where such application is made within a month after receiving a copy of such motion, within thirteen (13) days after the Court's order setting a hearing date on such motion and some five (5) days before such hearing date which hearing on these matters was continued and actually not heard until months later?

7. Is a school district denied the due process of law under the Constitution of the United States when, although being directly affected by the outcome of the litigation, is permitted to intervene only to attack the remedy fashioned by one of the parties and not on all issues of the litigation?

Constitutional Provisions, Statutes and Rules Involved

The relevant constitutional provisions, Statutes and Rules relevant to the issues in this case are: U. S. Constitution, Amendment V; U. S. Constitution, Amendment XIV, Section 1; Pennsylvania Constitution, Art. 3 § 32 (4); Pennsylvania Public School Code of 1949, Mar. 10, P. L. 30, Article II, § 201; May 11, P. L. 1089, § 1; § 242.1, added 1965, June 23, P. L. 139, § 1, as amended 1967, December 19, P. L. 865, § 1; § 211; Pennsylvania Special Act of 1968, July 8, P. L. 299, No. 150, § 1 *et seq;* Rules of Federal Civil Procedure, Rule 12 (h) (3), 19 and 24. (Appendix pps. 91-106).

Statement of Case

Turtle Creek Area School District and Churchill Area School District are independent school districts located in Allegheny County, Pennsylvania, whose motions to intervene as parties in interest were denied. The amended complaint was by black parents represented by Neighborhood Legal Services, whereby the plaintiffs contended that the General Braddock Area School District was formed by agents of the Commonwealth of Pennsylvania establishing the district so as to concentrate the low income families and a minority race within the district in violation of the Constitution of the United States and certain acts of Congress. (No decision nor finding was made as to the low income family concentration.) The amended complaint did not in any way claim that the formation of those districts surrounding General Braddock Area School District were formed in an unconstitutional manner. The named defendants in the amended complaint filed motions for dismissal of the complaint beause the complaint failed to name necessary party defendants; that is, the school districts surrounding General Braddock Area School District. The District Court denied this request by order of December 8, 1971, found in appendix pps. 109, 110.

The Commonwealth of Pennsylvania, a named defendant, filed a motion to join parties to Rule 21, claiming that certain school districts, including the two named petitioner districts, were necessary so that a proper and complete adjudication could be rendered and justice be done in accord with Rule 19 of the Federal Rules of Civil Procedure. There was no question as to the school districts being subject to the jurisdiction of the District Court as to service of process and without depriving the Court of jurisdiction. This motion was filed four (4) days before the trial was set

for hearing. There was contained in the motion of the Commonwealth of Pennsylvania a request for the certification of said order denying the motion so that an early appeal could be taken on this matter. Appendix pps. 111-116. The motion of the Commonwealth of Pennsylvania was denied on the day of the hearing (317a-318a), appendix pps. 116-117. The Court, in denying the motion of the Commonwealth of Pennsylvania, indicated the thinking of the Court as to what the law issue of the case was when he stated, "We presume, although I am not saying, at this time, that the nature of the remedial action is going to be entirely up to the Commonwealth and that, in taking such action, of course, there are the administrative opportunities for those persons or those bodies who may be included or excluded to be heard, as I believe that they were in the state proceedings before this matter came before this Court." The Court was obviously referring to the school districts and suggested that the school districts' interest was such that they would not be precluded from being fully heard on the matter through other procedures, and therefore, they could protect their interest in another proceeding. The earlier holding of the Court on its refusal to dismiss the action would indicate that the Court believed the interest of the school districts was such that they had no legal interest to protect and, therefore, were not necessary parties.

The hearing proceeded without any amendment being made to the answer of the defendants, which answers denied the allegation of any unconstitutional acts by the state authorities. It was not until after the hearing that the petitioning school districts discovered that no testimony was offered or intended to be offered by the defendants in support of their denial. The order of court of May 15, 1973 was filed and the District Court found (a) the Allegheny County and State Boards of Education maximized racial

segregation within the public schools of the central eastern portion of Allegheny County when these Boards created the General Braddock Area School District and other school districts (finding of fact 51, appendix p. 30); (b) in addition, the County and State Boards created a racially segregated school district and perpetrated exacerbated and maximized recial segregation (findings of fact 56 and 57, appendix p. 33); and (c) the General Braddock School District was formed by the merger of the Braddock School District, the Rankin School District, and the North Braddock School District, where, in 1967, the per centage of non-white students in Bradlock was 63.84, in North Braddock 19.62, and in Rankin 51.30 (opinion p. 569a, appendix p. 29) and after the merger in 1971, the General Braddock School District student black population was 44.98% (finding of fact 37, appendix p. 23).

The District Court, in its opinion, held that the state officials could have done better in balancing the races (findings of fact 41 through 45, appendix pps. 24-27). The plaintiffs did not suggest that the state act, Act 150, by which General Braddock Area School District was formed was unconstitutional or any of the earlier state acts, by which certain of the districts adjacent and near-by were formed, were unconstitutional. No request was made by the plaintiffs for the presentation of their complaint to a three-judge court.

The State Act 150 under which General Braddock School District was formed specifically excluded those school districts which had merged under a prior act known as the State Act No. 299 (see appendix p. 97). The school district of General Braddock Area and the school district of Turtle Creek Area, as they are presently constituted, were surrounded by school districts that had been formed by earlier acts and were, therefore, not required under State Act 150 to merge with other districts in order to

make a larger district (see map presented to Third Circuit Court of Appeals, appendix pps. 107-108).

The order of the District Court of May 15, 1973 ordered the State Board of Education to prepare a plan to " . . . alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or near-by school districts".

Within thirty (30) days of the filing of the Court's order of May 15, 1973, the petitioners moved the District Court to allow both to intervene as parties in interest under Rule 24. (Appendix pps. 45-49 and 49-51). On June 13, 1973, the District Court denied both petitions without an opinion being filed (appendix pps. 48, 50). The petitioners appealed the decision of the District Court to the Third Circuit Court of Appeals. The District Court received a motion filed by the Pennsylvania Board of Education in compliance with the order of the District Court of June 13, 1973 (appendix pps. 51, 52), and did enter an order on October 11, 1973 establishing a hearing date on said motion of the Pennsylvania Board of Education (appendix pps. 53-55). In this same order, the Court granted school districts which were directly affected by the Commonwealth's plan a right to intervene if they so chose to do so, but severely restricted the issues that were permitted to be involved in the hearing and insisted upon the filing of certain objections, as well as a pre-trial statement indicating witnesses, testimony and other evidence that the district proposed to offer, all of which had to be done within thirteen (13) days of the date the order was filed.

Within thirteen (13) days of this order of the District Court, both of the petitioners filed a second motion to intervene as parties in interest under Rule 24. One of the petitioners, Churchill Area School District, filed a petition to

intervene on the restricted basis offered by the District Court in its order of October 11, 1973. The District Court, on November 6, 1973, filed an order denying the motions of the petitioners to intervene as parties in interest and granted the motion of Churchill Area School District to intervene on the limited basis offered by the Court (appendix pps. 56-91). Both petitioners, again, filed an appeal to the Third Circuit Court of Appeals on the refusal of the District Court to permit the petitioning school districts to interplead as parties in interest and to be heard and argue all issues. The appeals were consolidated.

The matter was in front of the Third Circuit Court of Appeals concerning the right of the petitioners to interplead as parties in interest in the action, especially in view of their interests not being properly protected either by testimony and evidence being offered to prove lack of unconstitutional actions by the state authorities in the formation of the General Braddock Area School District, and the failure of the refusal of the defendants to take an appeal within thirty (30) days of the May 15, 1973 order of the District Court so as to protect the interests of the petitioners, and also for purposes of remedy still to be litigated, as well as the basic issues of jurisdiction mentioned by the petitioners and upon which the Third Circuit Court of Appeals refused to act. The Third Circuit Court of Appeals in their opinion (appendix pps. 1 to 7) held that the request of the petitioners for the Court to act, *sua sponte*, would not be an appropriate action for the Third Circuit Court of Appeals to take because it would "upset proceedings before the District Court that have proved satisfactory to all of the present parties to the case". (Footnote 3 in the Circuit Court's opinion.) The Appellate Court dismissed the appeals of petitioners holding that the petitioners were untimely in their application.

The result of the action of the Third Circuit Court of Appeals in sustaining the actions of the District Court is that both petitioners, even though their very existence is in jeopardy, are denied any meaningful hearing in respect to the controlling issues in the case.

REASONS FOR GRANTING THE WRIT

1.

The decision of the Third Circuit Court of Appeals is irreconcilably conflicting with cases in Circuits throughout the United States, with the Supreme Court decisions and Rule 12 of the Federal Rules of Civil Procedure.

A. Scope of review by a Circuit Court upon presentation of an appeal from a District Court by persons denied the right to intervene under Rule 24.

(1) The Supreme Court case of *Mansfield, C. & L. M. Railroad Co. v. Swan,* 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884) established the principle that the first duty of an Appellate Court is, *sua sponte,* if not moved to it by either party, to examine the sufficiency of the plea of jurisdiction of the Trial Court. The reasoning being that the judicial power of the United States is limited and it is only those cases which the Constitution and the laws of the United States establishes jurisdiction of the Federal Court that are permitted to be heard and determined by the Federal judiciary.

(2) Circuit Courts of Appeal followed the *Mansfield* case without making any exceptions to matters involving the appeal from a refusal of the District Court to grant petitions to intervene.[1]

[1] *U.S. v. Heywood-Robinson Co.,* 430 F.(2d) 1077 (C.C.A., 2d Cir., 1970); *Shahmoon Industries, Inc. v. Imperato,* 338 F.(2d) 419 (C.

(Footnote continued on following page)

In the case of *Shahmoon Industries, Inc. v. Imperato*, 338 F. (2d) 449 (C. C. A., 3rd Cir., 1964) the Court at page 351 stated: "The rule, springing from the nature and limits of the judicial power of the U. S., is inflexible and without exception which requires this Court, of its own motion, to deny its own jurisdiction, and, in the exercise of this appellate power, that of all other courts of the U. S., in all cases where such jurisdiction does not affirmatively appear in the records on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this Court, and then of the court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

(3) The rule of the *Mansfield* case has been codified in Rule 12 (h) Federal Rules of Civil Procedure, 28 U. S. C.

Rule 12 (h) of the Federal Rules of Civil Procedure (3) states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

In our instant case, the Third Circuit Court of Appeals, when it was suggested by the petitioners, the would-be intervenors, that the District Court did not have jurisdiction over the subject matter held that to allow the would-be intervenors to raise this question when the "parties to the action were satisfied with the procedure" would be

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C.A., 3rd Cir., 1964); *Haynes v. Felder*, 239 F.(2d) 870 (C.C.A., 5th Cir., 1957); *Beck v. Miriani*, 293 F.(2d) 336 (C.C.A., 6th Cir., 1961); *Rock Island Millwork Co. v. Hedges-Gough Lumber Co.*, 337 F.(2d) 24 (C.C.A., 8th Cir., 1964); *Gorsuch v. Fireman's Fund Insurance Co.*, 360 F.(2d) 23 (C.C.A., 9th Cir., 1966).

creating an unwarranted interference with the work of the District Court. It is the position of the petitioners that Rule 12 (h) (3) was violated by the Third Circuit Court of Appeals in that the rule clearly states that the jurisdictional question can be made to appear by suggestion of the parties "or otherwise".

B. Presence or absence of an indispensable party as a matter which determines the jurisdiction of the District Court.

The question of indispensable parties was one of the jurisdictional questions raised by the petitioners and has been held by a number of cases to be a jurisdictional question.[2]

The Third Circuit Court of Appeals failed to examine into this question of indispensable parties and the District Court held that the intervenors were not indispensable parties when refusing the motions of the named defendants under Rule 19.[3] And, apparently, holding for the same reason that the petitioners could not intervene as parties in interest. The Pennsylvania law is different than the laws of many other states involving the same subject matter as the instant case. The State Board of Education in Pennsylvania has no constitutional powers, the only powers it has being legislated powers. The Legislature of Pennsylvania is also limited by the Constitution of Pennsylvania in that the Constitution denies the Legislature the right to pass special legislation in establishing school districts. The Legislature is restricted to passing general legislation and, therefore, under the Constitu-

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[2] *Gorsuch v. Fireman's Fund Insurance Co.*, (*supra*); *Television Reception Corp. v. Dunbar*, 426 F.(2d) 174 (C.C.A., 6th Cir., 1970); *Agrashell, Inc. v. Hammons Products Co.*, (C.C.A., 8th Cir., 1965).

[3] 575a-577a, appendix pps. 35-37.

tion of Pennsylvania the Legislature is not empowered to remedy any unconstitutional formation of General Braddock School District.[4]

The State Board of Education is not mentioned and is not given any powers under the Pennsylvania Constitution as has been done in other states such as Michigan and Virginia.[5] The Pennsylvania State Board of Education is an administrative body and has only legislated authority.[6]

The school districts in the State of Pennsylvania were established by legislative authority as having the same boundaries as the municipalities unless otherwise already established.[7] The only changes permitted in accordance with the Act of 1949 are those under the provisions of the act or as granted in later legislation. Later legislation did permit some changes and, one such act, was the legislative act which established the school district in question, that is, the General Braddock Area School District. This act, commonly known as Act 150 (Act of 1968, July 8, P. L. 299; 24 P. S. 2400 *et seq.*), was a "one-shot" act and, while granting the Pennsylvania State Board of Education restricted authority to establish districts, even against the wishes of the districts or the people therein, gave such authority only for a limited period of time and

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[4] See Article 3, § 32 (4), Constitution of Pennsylvania. "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law, and specifically the General Assembly shall not pass any local or special law: (4) for . . . changing . . . school districts;"

[5] *Bradley, et al. v. Milliken, et al.*, 484 F(2d) 215 (C.C.A., 6th Cir., 1973) and *Bradley v. School Board of City of Richmond, Virginia*, 462 F.(2d) 1058 (C.C.A., 4th Cir., 1972)

[6] *Kentucky Fried Chicken v. Unemployment Compensation Board of Review*, 309 A(2d) 165, 9 Pa.Cmwlth. 474 (1973).

[7] Act of 1949, March 10, P.L. 30, Article II, § 201; 1949, May 11, P.L. 1089, § 1; (24 P.S. § 2-201), appendix p. 91.

for one such action in the creation of the districts. Act 150 has been exhausted by its use and is now only of historical value.

The Act of 1949 is still viable and it does permit mergers of school districts to be voluntarily made amongst the school districts.[8] It, therefore, becomes obvious that certain parties who are not named as parties in the suit are necessary in order that a remedy can be fashioned for the General Braddock Area School District's problems, if such a remedy demands change of "adjacent and/or nearby" school district boundaries. The Detroit case, *Bradley v. Milliken* (*supra*), held that the school districts are indispensable parties in the litigation where they may be affected in devising the remedy. In our instant case, an application under Rule 19 to add adjacent and nearby school districts, was made by the named party defendants and it was refused by the District Court and the District Court refused to certify such order even though requested by the named defendants.

In our instant case, because of the peculiarities of Pennsylvania law, the school districts in Pennsylvania are even more indispensable than they would be in states such as Michigan and Virginia where the Constitutions give power directly to the Boards of Education to make changes in the boundaries of the various school districts.[9] It be-

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[8] Act of 1949, March 10, P.L. 30, Article II, § 242.1, added 1965, June 23, P.L. 139, § 1, as amended 1967, December 19, P.L. 865, § 1; 24 P.S. § 2-242.1. (Appendix p. 91)

[9] In the case of *Wright v. County School Board of Greensville County, Virginia*, 309 F. Supp. 671 (1970), which is the Trial Court decision in the case decided by the Supreme Court of *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196 (1972), the Court held that the District Court could not make a party to the action do what the party had no power to do under the law. In addition,

(Footnote continued on following page)

comes evident that the school districts which may be affected by the remedy are also indispensable parties because they are needed in order to render justice between the parties already before the Court.[10]

C. As to the matter of whether or not the District Court could assume jurisdiction and order redistricting where the complaint, the evidence, and the findings of the Court claimed and determined that the unconstitutional act was the merger of school districts, whose boundaries were conterminous with their municipal boundaries and *de facto* segregation existed in two districts whereby 72% and 51% of the student bodies were minority races and the third school district contained a 28% minority race student body, so as to create a student body consisting of 43% minority race for the reason that the authorities had alternatives with lesser resulting minority ratios.

The District Court, after hearing evidence on the complaint of the plaintiffs, found that even though a dual school system never before existed, that the merger by the state authorities under Act 150 of a school district which had the same boundaries as the municipality and had a black ratio of 72% in its student body with another school district also having the same boundaries as a municipality and having a black ratio of 51% in its student body with a third school district also having the same boundaries as a municipality and containing only 28% black student body so as to form a district constituted a student body of 43% black as having violated the Constitution of the United States so as to give the District Court jurisdiction for the reason, that the Court said, that the State Board

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this Court held that, in keeping with the well-known principle of equity, a decree cannot be made which will bind a person not a party to a proceeding, and the jurisdiction of the court is limited to those over whom it obtains personal service and who, therefore, have their day in court."

[10] *Washington v. U.S.*, 87 F.(2d) 421 (C.C.A., 9th Cir., 1936)

of Education had "alternatives" where there would have been a lesser concentration of black.[11] In making this determination, the District Court ignored the mandates of Act 150, refused to insist on a three-man Court finding Act 150 as being unconstitutional, and determined that there were other better possible combinations which would have lessened the black concentration even more than was done by the State Board of Education even though one of the mandates of Act 150 permitted districts which had been formed under a prior act to avoid any merger under Act 150.[12]

The General Braddock Area School District, as presently constituted, and one of the petitioners, the Turtle Creek Area School District as presently constituted, were completely surrounded by school districts which were so protected by the mandate of Act 150 (See map presented to Circuit Court of Appeals. Appendix p. 107). It is the contention of the petitioners that not only the District Court ignore the restrictions which were binding on the Pennsylvania State Board of Education by Act 150, but even if other combinations were available to the State Board of Education so as to lessen the black concentration, that the District Court should not have taken jurisdiction of this case in view of the acts of the State Board of Education actually reducing the black concentration in two

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[11] 564a-567a, appendix pps. 24-27.

[12] Act of 1968, July 8, P.L. 299, No. 150, § 1 reads, "The State Board of Education, within thirty (30) days of the effective date of this act, shall adopt standards of approval of administrative units comprised of those school districts *which are not in the administrative unit established as a school district under Section 296 of the Act of March 10, 1949 (P.L. 30), as amended*, taking into account the following factors: Topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes, and the capability of providing a comprehensive program of education."

of the constitutent school districts which made up the General Braddock Area School District formed under Act 150. No other cases can be found by the petitioners in all of the United States where a District Court has assumed jurisdiction on such a complaint and upon such evidence and on such a finding by this District Court. The Third Circuit Court of Appeals, even though it had all of the record in front of it concerning this particular jurisdictional question, refused to even examine the matter.

In the case of *Spencer v. Kuegler*, 404 U. S. 1027, 30 L. Ed. (2d) 723, 92 S. Ct. 707 (1972) the Supreme Court sustained the Lower Court and stated: "A Federal Court is precluded from imposing upon school authorities the affirmative duty to cure racial imbalance in the situation of '*defacto*' segregation defined as racial imbalance that exists to no discriminatory action of state authority."

In our instant case, the District Court held that there was a creation of segregation or a maximizing of segregation or an exacerbation of segregation where the evidence disclosed that the resultant district actually had a lesser percentage of black students than two (2) of its constituent districts. It is the contention of the petitioners, under these state of facts, that there was no jurisdiction in the District Court to entertain this action and the action should have been dismissed by the District Court; and on failure of the District Court to dismiss, should have been remanded by the Third Circuit of Appeals to the District Court with instructions to dismiss the action.[13]

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[13] See also *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.(2d) 554 (1971) where the Supreme Court said: "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." (p. 24 of 402 U.S. 1, and 1280 of 91 S.Ct. 1267.)

D. As to the matter of the extent of the remedial powers of the District Court in altering school district boundary lines and otherwise affecting them for the purpose of remedying an unconstitutionally-formed school district situation of a neighboring district.

The District Court, in our case, has ordered the alteration of the boundaries of the "unconstitutionally-formed" school district and the boundaries of those "adjacent and/or near-by" districts, as appropriate. The petitioners took a second appeal which was consolidated with the earlier appeal. The second appeal was from the refusal of the petitions of the same two school districts to intervene as parties in interest after having been named as two districts involved in redistricting under the order of the District Court.

The Fourth Circuit has determined that the Federal District Court does not have such broad remedial powers as to affect districts not otherwise found to have been formed in violation of the Constitution in order to remedy constitutional violations found to exist in another district. *Bradley v. School Board of City of Richmond, Virginia, (supra)*[14]

The Sixth Circuit has determined that the Federal District Court does have power broad enough to cross over boundary lines in the reassignment of pupils. *Bradley v. Milliken, (supra)*. At the time of sending this petition to the printer, no decision of the Supreme Court has been handed down on this case although the petition for a writ of certiorari was granted, the matter has been argued, and this point is one of the issues presently before the Supreme Court. In our case, the District Court has before it a plan not only altering the boundaries but eliminating the exist-

[14] See also *Starr v. Parks, (supra)*.

ence of school districts including the two petitioners. This issue was not passed upon by the Third Circuit Court of Appeals and, if this power to remedy is not a matter concerning jurisdiction of the District Court, the refusal of the Court to allow the petitioners to intervene may foreclose the school districts affected from ever having this matter contested by appeal as no appeal was filed by any of the parties within the thirty (30) days after the order of May 15, 1973. (The petitioners asked to intervene so as to be able to file an appeal.)[15]

E. As to the matter of timeliness in presenting a petition to intervene.

In the United States Court of Appeals, District of Columbia, in the case of *Hodgson v. United Mine Workers of America*, 473 F. (2d) 118 (U.S.Ct. of App., Dist. of Col., 1972) the Court stated, on page 125, that: "It is well settled that in ruling on an application for intervention the Court is required to exercise a considerable degree of discretion. Moreover, the various factors which guide the exercise of that discretion may change substantially as the litigation progresses. Where . . . a Court's ruling has discretionary elements based on circumstances which are subject to alteration, the law recognizes the power and responsibility of the Court to reconsider its ruling if a material change in circumstances in fact occur." In holding that the Lower Court was in error in denying the petition to intervene as being untimely, the United States Court of Appeals of the District of Columbia stated on page 129 that: "While timeliness is a prerequi-

[15] In *Brown Shoe Co. v. United States*, 370 U.S. 606, 82 S.Ct. 1502, ____L.Ed. ____ (1962) the Supreme Court established the pragmatic approach to the determination of the finality of the judgment and held that the order was final and appealable even though the specific remedial plan was not included in the order.

site to any claim for intervention under Rule 24, it is settled particularly where intervention is sought as of right—that the amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness. Rather, the Court should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties to the case."

It is the petitioners' contention that the District Court erred in deciding that the petitioners were not indispensable parties as not needed to grant complete relief to the parties to the action or whose interest is such that their absence may injure their ability to protect that interest or submit the present party to multiple or inconsistent obligations.[16] The Court suggested that the school districts had only a permissive right to intervene. (See the petitioners' arguments in B, above, in which they suggest that they should have been brought in as indispensable parties under Rule 19.)

In addition to the argument as being necessary parties under Rule 19, Rule 24 requires even a lesser degree of interest than that of an indispensable party.[17] In the case of *Smuck v. Hopson*, 408 F.(2d) 175 (C.C.A., D.C., 1969) the Court overruled the Lower Court for denying the petitioning parents of students from intervening for the purpose of pursuing an appeal. The interest of the parents in their children's education was sufficient enough.

As stated in the case of *Hodgson v. United Mine Workers of America*, (*supra*) in note 37, page 125, "The impact of

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[16] 575a-577a., appendix pps. 35-37.

[17] See *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129, 86 S.Ct. 932, 17 L.Ed. (2d) 814 (1967); *Nuesse v. Camp*, 385 F.(2d) 694 (C.C.A., D.C., 1967).

changed circumstances upon an application for intervention may be illustrated by a simple example. In litigation involving A against B, C applies to intervene on A's side as a right under Rule 24 (a) (2). The Court decides that C's interests are adequately represented by A and denies the application. At some later time, A becomes lax in his prosecution of the case, thereby jeopardizing C's interest. An application by C at this time would warrant a different determination by the Court as to the propriety of C's intervention."

In our instant case, not only did the petitioners allege that the parties who should have protected their interest did not do so (the hearing on the merits was *ex parte*, in that no testimony was presented by the defendants even though the issue of denial of wrong-doing was raised by the pleadings), but also that the interests of the named parties were conflicting to the interests of the petitioners and that the named defendants colluded with the plantiffs. The presence of conflicting interests was set forth in defendants' motion to join parties, (including your appellants, pursuant to Rule 19 which motion was heard on the day of trial.)[18]

The area of conflict was never spelled out, but the denial of the wrong-doing alleged in plaintiffs' complaint was not amended. The parties defendant had filed narrative statements in which they said they were not going to produce any testimony at the time of the hearing, but none of these documents were ever given or brought to petitioners' attention. It was not until after the trial that petitioners' realized that no evidence was going to be presented to refute the plaintiffs' contentions that the actions of the state authorities were guided indirectly at least by racial factors in forming the General Braddock School District. It was not until after the order of court on May 15, 1973 that the

[18] 307a, appendix p. 111.

petitioners were aware that the defendants did not intend to appeal the decision of the District Court. The petitioners filed their petitions for the purpose of taking the appeal as well as for all matters concerning remedy.

The District Court later permitted all school districts who were named in a proposed order of remedy to petition as permissible intervenors to intervene but to be narrowly restricted in what evidence they could offer and on what issues. Both petitioners presented, at that time, petitions to intervene as parties in interest (the second such petition). The District Court again denied these petitions to intervene as parties in interest and appeals were filed and consolidated for argument before the Third Circuit Court of Appeals. One of the petitioners also filed a petition to intervene as a permissible intervenor on the restricted basis offered by the District Court and such petition was granted. The other petitioner, Turtle Creek Area School District, is not a party for any purposes in this action. The Sixth Circuit majority demanded that all of the school districts be heard on all matters of remedy. (See *Bradley v. Milliken*, (*supra*))

The petitioners believe that they are entities entitled to the same due process as any person or entity under the Constitution of the United States.[19] Both petitioners are vested as bodies corporate with all necessary powers to enable them to carry out the dictates of the legislative acts concerning the providing of education for students within their boundaries.[20] The petitioners are empowered to contract in all respects, to sue and be sued, and to levy taxes.

The petitioners' believe that unless they are granted the right to intervene as parties in interest they will be deprived of their rights without due process of law. A number of

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[19] *Bradley v. Milliken, (supra).*

[20] Act of 1949, March 10, P.L. 30, Article II, § 211; 24 P.S. § 2-211. (Appendix, p. 94)

issues other than the matters involving jurisdiction, the extent of the power of the District Court to fashion a remedy to overcome unconstitutional actions of state authorities, and the scope of review of the Appellate Court of an order dismissing a petition to interplead are still involved. The *ex parte* proceeding permitted certain conclusionary facts to be determined without any contest and the basic issues of fact and law to be binding upon the parties to the litigation and possibly affect others even though such findings and legal conclusions are wrong.[21] The Court of Appeals in the case of *Hodgson v. United Mine Workers of America*, (*supra*), on page 131, pointed out the need for permitting the petitioners to intervene when the Court stated: "The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversey are afforded an opportunity to be heard."

2.

(a)

The decisions below involve issues of immense public importance as to the impact of the precedent established by the action with their great and recurring significance and the impact upon the petitioners as well as other school districts involved.

The issue of the extent of the federal judicial power to remedy acts of state officials which violate the constitutional rights of individuals is involved. This power, as exercised in the matters of school segregation, has never been extended in a situation where no dual school system existed, to permit the District Court to force the

[21] See Argument C, above, for one such matter concerning the mandates of Act 150.

changing of the boundary lines and eliminate the very existence of school districts which have not been found to have been formed in an unconstitutional manner but just for the purpose of remedying the acts which were found to be unconstitutional in the formation of a neighboring district. The Supreme Court has a similar issue presently before it in the case of *Bradley v. Milliken*, (*supra*), but in that case the District Court, and apparently the Appellate Court, were not talking about changing boundary lines of the districts but the busing of the students across district lines. The far-reaching impact of the decision on this point which has never been decided by the Supreme Court is apparent.

The issue of the jurisdiction of the District Court to proceed without any school district as a party to the action, either the school district involved or school districts which may and/or are involved in the fashioning of a remedy for the acts of state officials found to have violated the rights of the students in the one school district involved, is of great and far-reaching impact upon the United States. These complaints are being filed throughout the United States and District Courts many have required the school districts to be included in the action while some others have not been requiring their presence.

The issue of jurisdiction of the District Court to hear a complaint and find an unconstitutional act of state officials to have occurred, based on the claims and evidence of the merger of three (3) districts, two containing a *de facto* imbalance of racial minority in the student body with a third district which did not contain an imbalance so as to create a district with a 44% minority where a dual system never existed because the state officials had alternatives whereby the ratio would have been less, is of great impact throughout our Nation. No cases have been

found where this claim has been made or a court has so found jurisdiction to exist. The Supreme Court has not passed on this important issue.

The issue of the scope of review of the Appellate Court in the matter of reviewing a refusal of a District Court to permit a party to interplead is one of recurring happening and should be decided by the Supreme Court. It appears that the Third Circuit Court of Appeals has made a distinction as to the scope of review in interpleader matters which has not been passed upon previously by the Supreme Court. The holding of the Third Circuit Court of Appeals also, in effect, would prolong litigation unnecessarily which is the very reason for the existence of Rule 12 (h) (3) and the right, *sua sponte*, of the Appellate Courts to examine the jurisdiction of the Federal District Courts.

The issue of timeliness of the petitioners in filing their petitions, while it is a factual question to a great extent, the Supreme Court has never passed upon a situation containing the facts of this case, and if the Supreme Court finds that the school districts are not essential parties to the litigation, then it becomes of great concern and great impact throughout the Nation for a determination of timeliness in matters involving these facts. The petitioning school districts were never named as parties defendant by the plaintiffs (the Court mentioned this in the record, 317a, appendix p. 116, when stating ". . . the plaintiff is willing to risk his suit on nonjoinder.") The constitutionality of the formation of the petitioners were never in issue and the boundary lines and very existence was not in issue until the remedy phase of the litigation. The petitioners were found by the Court to not be necessary parties to the litigation on the day the hearing was to start, and the issues presented by the pleadings indicated that those who

were to represent the petitioners denied that the state officials acted in an unconstitutional manner. The petitioners did petition to interplead before the normal appeal period for a final order had elapsed and before any of the issues concerning remedy had been heard. The first petitions were filed even before the petitioners were named specifically as school districts who were to be affected. (Up to the filing of the motion by the Pennsylvania State Board of Education, the only description given by the Court was "adjacent and/or near-by" school districts "where appropriate" . . . to identify petitioners).

The issue of due process is cases involving school desegregation as to school districts whose only connection is in the remedy phase of the litigation is of national importance and has never been passed upon by the Supreme Court. The problem of what issues can be questioned and on what issues can testimony be offered by school districts who have not been named in the litigation and whose formation has not been questioned as to the constitutionality is of national importance especially where other cases have been filed without naming the school districts as parties in the beginning and who are later involved in the fashioning of the remedy.

(b)

The impact that this decision will have upon the petitioners, as well as other school districts, is readily apparent. An examination of the plan presently before the District Court (appendix p. 52) will disclose that the suggested remedy would merge four (4) school districts with a segment of General Braddock Area School District and two (2) school districts with the remaining two (2) segments of the General Braddock Area School District. The administrative problems, the taxing problems, the

new and enlarged busing problems, as well as the budgetary problems and board representation problems can be readily seen. The school districts experienced these same problems from 1968 until 1971 during the formation of a number of these districts and will now be forced to experience the same problems once again on a grander scale. The interests of these school districts are such that the Supreme Court should review the decision of the Third Circuit in order to see if the fundamental constitutional rights of the school districts of due process of law have been protected as well as those of the students and parents of the students involved.

Respectfully submitted,

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